

DATE: December 9, 1998

CASE NO: 97-ERA-48

In the Matter of

ROBERT H. MOODY

Complainant

v.

TENNESSEE VALLEY AUTHORITY

Respondent

**RECOMMENDED ORDER APPROVING SETTLEMENT AND
APPROVING WITHDRAWAL OF COMPLAINT**

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), as amended 42 U.S.C. § 5851. A "Memorandum of Understanding and Agreement" ("Agreement") was executed by Complainant and Respondent, respectively, and was submitted for my review and approval on November 25, 1998. The Settlement Agreement provides that Complainant withdraws the complaint herein.

I must determine whether the terms of the agreement are a fair, adequate and reasonable settlement of the complaint. 42 U.S.C. § 5851(b)(2)(A) (1988). *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.3d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.

The Agreement provides that Complainant releases Respondent from claims arising under the ERA as well as under various other laws. This review is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the ERA. *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2.

The Agreement states that Respondent will pay Complainant a specified amount. It also provides protections for Complainant with respect to the contents of TVA's employment records.

Paragraph four of the Agreement contains a confidentiality provision which provides, *inter alia*, that “Except as provided by valid legal process or order, and subject to the provisions of paragraph 5, Mr. Moody and his attorney agree not to disclose or discuss with anyone, except their families or tax advisors, the terms of this agreement. In the event that Mr. Moody or his attorney receives legal process or an order purporting to require disclosure of the terms of this agreement, they agree to timely notify TVA's Office of the General Counsel in order to give TVA an opportunity to object prior to any disclosure.”

The Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988) (FOIA) “requires agencies to disclose requested documents unless they are exempt from disclosure . . .” *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspections Services*, 96-TSC-5, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. *see also Pulmlee v. Alyeska Pipeline Services Co.*, Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 9, 10, Sec. Final order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6; *Davis v. Valley View Ferry Authority*, Case No. 93-WPC-1, Sec. Final Order Approving Settlement and Dismissing Complaint, June 28, 1993, slip op. at 2 n.1 (parties’ submissions become part of the record and are subject to FOIA); *Ratliff v. Airco Gases*, Case No. 93-STA-5, Sec. Final Order Approving Settlement and Dismissing Complaint with Prejudice, June 25, 1993, slip op. at 2.

The records in the instant case are agency records which must be made available for public inspection and copying under FOIA. In the event a request for inspection and copying of the record is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA requests have been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. Further it would be inappropriate to decide such questions in this proceeding. Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestor from denial of such request , and for protecting the interests of submitters of confidential commercial information. *See* 29 C.F.R. Part 70 (1995).

The confidentiality provisions in paragraph four of the Settlement Agreement could also constitute a “gag provision” that is unacceptable as being against public policy if it precludes Complainant from communicating with federal or state enforcement agencies concerning alleged violations of law. However, I interpret this language (quoted above) as not preventing Complainant either voluntarily or pursuant to an order or subpoena, from communicating with, or providing information to, state or federal authorities about

suspected violations of law involving Respondent. Therefore, paragraph four does not contain an invalid gag provision. *Thorton v. Burlington Environmental and Phillip Environmental*, 94-TSC-2, Sec. Final Order Approving Settlement and Dismissing Complaint, Mar. 17, 1995. Moreover, in the event that this interpretation is incorrect, paragraph nine provides that "Nothing in this agreement shall be construed to prohibit Mr. Moody from reporting any suspected instance of illegal activity of any nature, any nuclear safety concern, any workplace safety concern, or any public concern to the United States Nuclear Regulatory Commission, the DOL, or any other Federal or State government agency, and shall not be construed to prohibit Mr. Moody from participating in any way in any Federal or State administrative, judicial, or legislative proceeding or investigation with respect to any claims and matters not resolved and terminated by this Memorandum of Understanding and Agreement." *Cf. Wampler v. Pullman-Higgins Co.*, 84-ERA-13, Sec. Final Order Disproving Settlement and Remanding Case, Feb. 14, 1994 (the Secretary rejected severance of the gag provision from the remainder of the settlement despite the respondent's acquiescence, as the complainant had requested that the provision be "stricken").

The Secretary requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties. *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7, ARB Case Nos. 96-109, 07-015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. Paragraph eight of the Agreement states that the Memorandum of Understanding and Agreement contains the entire agreement between the parties concerning this matter. Accordingly, the parties have certified that the agreement constitutes the entire and only settlement agreement with respect to Complainant's claims.

Finally, I note that the agreement makes no reference to a fee for Complainant's attorney. Thus, it appears that Complainant will pay his attorney's fee, if any. The Secretary has held:

Where attorney's fees are incorporated in an agreement, the ALJ does not approve the fee amount. If, however, the parties submit an agreement providing for Complainant to pay his attorney, the ALJ must take into consideration whether the net amount to be received by Complainant is faire, adequate and reasonable.

Tinsley v. 179 South Street Venture, 89 CAA-3, Sec. Order of Remand, Aug. 3, 1989, slip op. at 3. In more recent decisions, the Secretary has held that it is not necessary for a settlement to specify the amount of an attorney's fee. *Guity v. Tennessee Valley Authority*, 90-ERA-10, ARB Case No. 96-180, Aug. 28, 1996, *Klock v. Tennessee Valley Authority*,

95-ERA-20, OAA May 1, 1996. Therefore, there is no requirement that the settlement agreement in the instant case include the amount of the attorney's fee for which the Complainant is responsible.

RECOMMENDED ORDER

I find that the agreement, as construed above, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, I recommend that **APPROVAL** of the agreement and **APPROVAL** of **THE WITHDRAWAL OF THE COMPLAINT WITH PREJUDICE**.

PAUL H. TEITLER
Administrative Law Judge